

Laneco Construction Systems, Inc. and United Brotherhood of Carpenters and Joiners of America, Local Union 1098. Case 15–RC–8311

August 21, 2003

DECISION AND DIRECTION

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

The National Labor Relations Board, by a three-member panel, has considered determinative challenges and objections in an election held November 17, 2000, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 23 for and 25 against the Petitioner, with 29 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's findings only to the extent consistent with this Decision and Direction.¹

I. BACKGROUND

The Employer is engaged in the construction industry in Louisiana. It employs a variety of skilled craftsmen, including carpenters and helpers. In about October 2000,² the Petitioner began an organizing drive among certain of the Employer's carpenters and helpers.

On October 24, the parties entered into a Stipulated Election Agreement (Stipulation). The Stipulation expressly included "All Journeyman and Helper Carpenters employed by the Employer at the Employer's Lafayette, New Iberia, and Baton Rouge, Louisiana job sites." It expressly excluded "all office clerical employees, professional employees, guards, and supervisor[s] as defined in the Act."

The Employer subsequently challenged the ballots cast by seven employees whom the Employer claimed it permanently laid off prior to the election. The Petitioner challenged the ballots cast by 12 journeymen carpenters and helpers supplied to the Employer by an outside company, Lang Drywall Company (Lang), claiming that jointly-employed carpenters and helpers were not covered by the Stipulation.

¹ In the absence of exceptions, we adopt the hearing officer's recommendations to sustain the challenges to ballots cast by employees Lawrence Butler, Christopher Lacy, Ronnie Wilson, Byron Sandifer, Arthur Acclise, and Joey Freeman. Prior to the hearing, the parties agreed that challenges to the ballots cast by employees Richard Rinehart, Michael Thompson, Gary Marcotte, and Kevin Zito should be sustained. Further, in the absence of exceptions, we adopt the hearing officer's recommendation to overrule the Petitioner's Objections 1 and 3.

² All dates are in 2000 unless stated otherwise.

Further, following the election, the Petitioner filed a series of election objections, alleging that the Employer improperly interfered with the election.

II. THE HEARING OFFICER'S REPORT

On March 16, 2001, the hearing officer issued her corrected Report and Recommendations on Challenges and Objections. She recommended that the Board overrule the Employer's challenges to the ballots cast by the laid-off employees, finding that the Employer failed to establish that they had no reasonable expectation of recall.

The hearing officer also recommended that the Board sustain the Petitioner's challenges to the ballots cast by the Lang-supplied carpenters and helpers. She found, under the Board's traditional community-of-interest principles, that a unit limited to the Employer's solely-employed carpenters and helpers was an appropriate unit.

Finally, the hearing officer sustained two of the Petitioner's election objections. As alleged in Objection 4, the hearing officer found that the Employer threatened to deprive employees of their *Laidlaw*³ rights in the event of an economic strike. As alleged in Objection 6, she also found that the Employer interfered with the election by submitting an *Excelsior*⁴ list that contained significant omissions and inaccuracies.

III. DISCUSSION

We adopt the hearing officer's recommendations with respect to the challenged ballots, but find it unnecessary at this time to pass on her disposition of the Petitioner's Objections 4 and 6.

A. *The Challenged Ballots*

1. The laid-off employees

The Employer challenged the ballots cast by employees Aaron Begnaud, John Begnaud, Joey Fontenot, Robert Parezo, Sterling Paul, Rodney Primeaux, and Linda Soileau. These employees were employed as of the eligibility date and their names appeared on the voter eligibility list. The Employer, however, argued that they were ineligible to vote in the November 17 election because they, allegedly, were permanently laid off on about November 7. As indicated, the hearing officer overruled the Employer's challenges, finding that the Employer failed to establish that the employees had no reasonable expectation of returning to work. We agree.

A "party seeking to exclude an individual from voting has the burden of establishing that the individual is, in fact, ineligible to vote." *Regency Service Carts, Inc.*, 325 NLRB 617, 627 (1998) (quoting *Golden Fan Inn*, 281

³ *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf'd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

⁴ *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

NLRB 226, 230 fn. 24 (1986)). Accordingly, it is the Employer's burden to show that the laid-off employees had "no reasonable expectancy of recall in the foreseeable future." See *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). This determination is made as of the date of the election and depends on objective factors including the past experience of the employer, the employer's future plans, and the circumstances of the layoff, including what the employees were told as to the likelihood of recall. *D. H. Farms Co.*, 206 NLRB 111, 113 (1973).

The Employer emphasizes General Manager Hurstell's testimony that the Employer had no prospects of additional work in Lafayette or New Iberia at the time of the employees' layoffs. Hurstell's testimony, however, is not dispositive. Hurstell did not claim, and there is no evidence, that the Employer's lack of work resulted from a fundamental change or shift in its business. To the contrary, Hurstell acknowledged the Employer had bid on the second phase of the Dautrieve Hospital project in New Iberia, which would have meant more work for the laid-off employees. And, in fact, employee Aaron Begnaud testified without contradiction that Foreman Tucker reassured him, "whenever the next phase of the [Dautrieve] job opened up, there was opportunity for work."⁵

For these reasons, as well as those fully discussed by the hearing officer, we find that the Employer failed to establish that the laid-off employees had no reasonable expectancy of recall. We therefore overrule the Employer's challenges to the ballots cast by these employees.

2. The Lang-supplied carpenters and helpers

The Petitioner challenged the ballots cast by employees Mike Baggett, Woody Breland, Michael Davis, Paul Garner, Mike McBeth, Pat Patke, Doug Pigott, Tom Roberts, Edgar Talley, Jamie Thomas, Carlos Vargas, and Jeremy Williamson. As described above, the Petitioner asserted that these employees were actually employed by Lang, a supplier of journeyman and helper carpenters to the Employer, and therefore were not the "All Journeyman and Helper Carpenters employed by the Employer" covered by the Stipulation. The Petitioner argued that the Stipulation's failure to mention jointly-employed carpenters and helpers demonstrated the parties' intent to exclude the Lang-supplied workers from the unit.

⁵ As it turned out, the Employer's bid for this job was unsuccessful. However, where, as here, employees are laid off after the payroll eligibility date but before the election, the reasonableness of the employees' expectancy of recall is measured as of the election, without regard to subsequent events. See *Apex Paper Box Co.*, 302 NLRB 67, 68 fn. 6 (1991); *Data Technology Corp.*, 281 NLRB 1005, 1007 (1986).

The Employer countered that the Lang-supplied carpenters and helpers fell within the express terms of the Stipulation because they were "employed by the Employer," albeit jointly with Lang. The Employer, citing extrinsic evidence in the record, further argued that the parties had agreed to include the Lang-supplied workers in the unit. Finally, the Employer argued that the Lang-supplied carpenters and helpers shared such an overwhelming community of interests with its solely-employed carpenters and helpers that a unit excluding the former employees would be inappropriate.

We adopt the hearing officer's recommendation to sustain the Petitioner's challenges for the following reasons. When making challenged-ballot determinations in stipulated election cases, the Board will rely on the stipulation as to the scope and composition of the unit, unless the stipulation contravenes the Act or established Board policy. See *Venture Industries*, 327 NLRB 918, 918-919 (1999); *Laidlaw Transit, Inc.*, 322 NLRB 895 (1997); *Gala Food Processing, Inc.*, 310 NLRB 1193 (1993).

Recently, in *Caesars Tahoe*, 337 NLRB 1096 (2002), the Board formally adopted the three-prong test for analyzing stipulations articulated in *Associated Milk Producers, Inc. v. NLRB*, 193 F.3d 539 (D.C. Cir. 1999). Under this test, the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

Applying the *Caesars Tahoe* test, we find that the hearing officer properly excluded the Lang-supplied carpenters and helpers from the unit. Initially, we find that the Stipulation was ambiguous as to the inclusion or exclusion of carpenters and helpers not solely-employed by the Employer.⁶ As the hearing officer explained, in *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2000), the Board held that the Act does not prohibit joining together in a single unit the employees of a user and the employees jointly employed by a user and a supplier without the

⁶ In so concluding, Member Acosta finds it unnecessary to pass on the merits of the Board's decision in *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2002), described below. Rather, he accepts it as prevailing Board law for purposes of analyzing this stipulation within the standards set out in *Caesar's Tahoe*.

consent of the supplier employer.⁷ Consistent with *Sturgis*, the Employer and the Union here could have stipulated to include both categories of employees in a single unit.

The Stipulation, however, neither expressly included nor expressly excluded jointly-employed carpenters and helpers, such as those supplied to the Employer by Lang. The parties thus failed to make clear their intentions. Admittedly, the Employer's reading of the Stipulation is reasonable. But the same may be said of the Petitioner's point that, if the parties shared a mutual intent to include jointly-employed carpenters and helpers, the Stipulation would have explicitly addressed this point. In these circumstances, we find that the Stipulation was ambiguous.⁸

We recognize, as the Employer argues, that the parties used the word "All" in describing the carpenters and helpers included in the unit. We do not find, however, that this term clearly and unambiguously spoke to the inclusion of the Lang-supplied carpenters and helpers. Our decision here is influenced substantially by the fact the Board had issued *Sturgis* less than 2 months prior to the parties' Stipulation. Prior to the change in the law occasioned by *Sturgis*, the Board would not have read the word "All" as extending beyond the Employer's solely-employed carpenters and helpers without the express

agreement of the supplier-employer. See *Lee Hospital*, 300 NLRB 947 (1990). We therefore decline in this case to construe the word "All," without more, as clearly establishing the parties' intent to include jointly-employed carpenters and helpers within the scope of the initial bargaining unit of the employer's employees.

We thus turn to the Employer's claim that extrinsic evidence in the record shows that the parties agreed to include the Lang-supplied carpenters and helpers in the unit. As the hearing officer did, we find insufficient record evidence of such an agreement. At best, as the hearing officer fully explained, the evidence, including the parties' correspondence, conduct, and testimony, shows that the parties discussed *Sturgis*-type carpenters and helpers, but never reached an agreement to include them in the unit. In particular, the correspondence offered by the Employer, which postdates the Stipulation but was created before the date of the election, actually shows a series of misunderstandings between the parties. Further, the stipulated testimony relied on by the Employer, which it drafted, simply does not prove that the parties agreed to include jointly employed carpenters and helpers in the unit.

Accordingly, we find that the hearing officer properly turned to the Board's traditional community-of-interest principles, and we affirm her finding that a unit limited to the Employer's solely employed carpenters and helpers was an appropriate unit. As stated, the hearing officer found "significant differences in the working conditions" of the Employer's solely employed carpenters and helpers and those supplied by Lang. Indeed, the record shows that the two groups of employees were subject to different hiring and firing criteria, had different wage rates and benefits, were carried on separate payrolls, and had different pay dates. Thus, as the hearing officer did, we reject the Employer's argument that the Lang-supplied carpenters and helpers shared such an overwhelming community of interests with its solely-employed carpenters and helpers that a unit excluding the former employees would be inappropriate. See *Engineered Storage Products Co.*, 334 NLRB 1063 (2001) (finding that a petitioned-for unit limited to the employer's solely employed employees was an appropriate unit where supplier-employer hired and fired and set the wage rates of jointly-employed employees). For these reasons, we sustain the Petitioner's challenges to the ballots cast by the Lang-supplied carpenters and helpers.⁹

⁷ Member Schaumber did not participate in the *Sturgis* decision. Since this case does not require that he pass on whether the issue presented in *Sturgis* and discussed herein was correctly decided, he does not do so.

⁸ Member Liebman finds that the Board's decision in *Gourmet Award Foods*, 336 NLRB 872 (2001)—a case decided after the parties here executed the Stipulation—is distinguishable on the following basis. While that decision involved a superficially similar interpretive question, with respect to a collective-bargaining agreement and its application to jointly-employed employees, it arose in a different context and implicated different considerations.

In *Gourmet Award Foods*, the Board held that the employer was obligated, under the duty to bargain in good faith, to apply the agreement to longer-term, jointly-employed employees who—that status aside—fell within the job classifications covered by the agreement's terms (drivers and warehousemen). The employer and the union had clearly contemplated the hiring of *short-term* joint employees, which the employer had traditionally done. But there was no indication that the hiring of longer-term, temporary drivers and warehousemen—who would always remain outside of the bargaining unit—was ever envisioned. Preserving the union's bargain with the employer, then, required treating the longer-term joint employees as new hires under the agreement. By its terms, the agreement permitted that result, which was not inconsistent with *Sturgis*.

Here, in contrast, the preliminary issue is whether the parties intended to include jointly-employed carpenters and helpers in a newly-defined, prospective bargaining unit. As explained above, the circumstances in this case disclose a latent ambiguity in the parties' stipulation. Because no extrinsic evidence of the parties' intent resolves the ambiguity, Member Liebman finds that the scope of the prospective bargaining unit ultimately must be decided using statutory community-of-interest principles.

⁹ As a result, we find it unnecessary to pass on the Petitioner's challenges to the eligibility of Lang carpenters Mike Baggett and Pat Patke on the alternative ground that they were statutory supervisors.

B. The Objections

As indicated, we find it unnecessary at this time to pass on the hearing officer's recommendations to sustain the Petitioner's Objections 4 and 6. In accordance with our resolution of the challenged ballots, we shall direct the Regional Director to open and count the ballots cast by the laid-off employees. This will alter the tally of ballots and, possibly, moot Objections 4 and 6. The following Direction specifically provides for the potential contingencies.

DIRECTION

The Regional Director for Region 15 shall, within 14 days from the date of this Decision and Direction, open

and count the ballots of employees Aaron Begnaud, John Begnaud, Joey Fontenot, Robert Parezo, Sterling Paul, Rodney Primeaux, and Linda Soileau at a time and place to be set by him. The Regional Director shall then prepare and serve upon the parties a revised tally of ballots. If the revised tally of ballots shows that the Petitioner has received a majority of the valid ballots cast, the Petitioner's Objections 4 and 6 will be moot and the Regional Director shall issue a certification of representative. If, however, the revised tally of ballots shows that the Petitioner has not received a majority of the ballots cast, then the Regional Director immediately shall transfer the case back to the Board for further proceedings.